STATE OF MICHIGAN

COURT OF APPEALS

DEBORAH HENNING,

Plaintiff-Appellant,

v

VERIZON WIRELESS, d/b/a Primeco Personal Communications Limited Partnership, a Delaware limited partnership qualified to do business in Michigan,

Defendant-Appellee,

and

GREGORY HALLER,

Defendant.

UNPUBLISHED
January 25, 2005

No. 251241
Oakland Circuit Court
LC No. 2002-044058-NZ

DEBORAH HENNING,

Plaintiff-Appellant,

v

VERIZON WIRELESS, d/b/a Primeco Personal Communications Limited Partnership, a Delaware limited partnership qualified to do business in Michigan,

Defendant-Appellee,

and

GREGORY HALLER,

Defendant.

No. 252628
Oakland Circuit Court
LC No. 2002-044058-NZ

Before: Talbot, P.J., and Griffin and Wilder, JJ.

PER CURIAM.

In Docket No. 251241, plaintiff Deborah Henning appeals as of right Oakland Circuit Judge Michael Warren's order granting defendant Verizon's motion for summary disposition in this action brought pursuant to the Elliott-Larsen civil rights act, MCL 37.2101 *et seq*. In Docket No. 252628, plaintiff also appeals the trial court's grant of defendant's motion for costs. The two actions are consolidated on appeal. We affirm.

First, this Court only considers "what was properly presented to the trial court before its decision on the motion." *Peña v Ingham Co Rd Comm,* 255 Mich App 299, 310; 660 NW2d 351 (2003). Accordingly, we first address plaintiff's claim that the trial court improperly struck her "reply brief" and affidavit. The trial court entered a scheduling order for defendant's motion for summary disposition, which specified that "the responding party's brief must be filed and received by the Court and opposing counsel on July 29, by 4:30 p.m." The order also notified the parties that they would waive oral argument if the briefs were not timely filed and that failure to file would indicate to the court that the parties lacked authority for their positions. Plaintiff filed a timely responsive brief and attached lengthy sections of plaintiff's deposition testimony, and defendant filed a response and affidavit contesting some of plaintiff's responsive allegations. Plaintiff attempted to file a second "reply" brief and plaintiff's affidavit on August 18, 2003, two days before the August 20 motion hearing. The court found that "no Court Rule or Scheduling Order permitted the Plaintiff's eleventh hour Reply to the Defendant's Reply, or the untimely affidavit attached to it." Plaintiff now asserts that the refusal was an abuse of discretion because neither the court rule nor the scheduling order either permitted or prohibited its filing.

A trial court is entitled to set a schedule for "future actions" and "events" in the lower court. MCR 2.401(B). MCR 2.116(G)(1)(a)(ii) provides that, unless the court sets a different period, "any response to the motion (including brief and any affidavit) must be filed and served at least 7 days before the hearing." Our Supreme Court has indicated that a trial court has the discretion to "decline to entertain actions beyond the agreed time frame." *People v Grove*, 455 Mich 439, 469; 566 NW2d 547 (1997); see also *EDI v Lear*, 469 Mich 1021; 678 NW2d 440 (2004), where our Supreme Court reversed an unpublished decision of this Court, Docket No. 240442, and ruled that "[t]he Court of Appeals clearly erred in finding that the Oakland Circuit Court abused its discretion when it enforced the summary disposition scheduling order."

Plaintiff argues here that the court rule only applies to a response to defendant's motion, *not* to a reply to defendant's responsive brief, and that the trial court's refusal was a violation of MCR 2.116(G)(5), which *requires* the trial court to consider affidavits. Plaintiff's argument is unsupported by any authority. No matter what plaintiff calls her brief and affidavit, it was not timely filed and the trial court had the discretion to refuse it.

To establish a prima facie case of retaliation under MCL 37.2701, a plaintiff must show, "(1) that the plaintiff engaged in a protected activity, (2) that this was known by the defendant, (3) that the defendant took an employment action adverse to the plaintiff and (4) that there was a causal connection between the protected activity and the adverse employment action." *Meyer v Center Line*, 242 Mich App 560, 568-569; 619 NW2d 182 (2000). A prima facie case of sex discrimination can be established by showing disparate treatment or intentional discrimination.

Dixon v W W Grainger, Inc, 168 Mich App 107, 114; 423 NW2d 580 (1987). In either case, the plaintiff must be able to show some adverse employment action. *Peña, supra* at 311; *Wilcoxon v Minn Mining & Mfg Co*, 235 Mich App 347, 364; 597 NW2d 250 (1999). The trial court here granted defendant summary disposition after concluding, *inter alia*, that plaintiff had not shown any adverse employment action against her and that, without that, none of her claims could survive. Plaintiff challenges the trial court's ruling. This Court reviews the trial court's grant or denial of summary disposition de novo. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998).

"[I]n order for an employment action to be adverse for purposes of a discrimination action, (1) the action must be materially adverse in that it is more than 'mere inconvenience or an alteration of job responsibilities,' and (2) there must be some objective basis for demonstrating that the change is adverse because 'a plaintiff's "subjective" impressions as to the desirability of one position over another' [are] not controlling." *Wilcoxon, supra* at 264. An adverse employment action "typically takes the form of an ultimate employment decision, such 'a termination in employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.'" *Peña, supra* at 312.

Here, as the trial court indicated, defendant's workforce was reduced in 2000 and again in 2001, and plaintiff kept her job while male friends of her supervisor were terminated in the company's "reduction in force." At the "time of the alleged constructive discharge, there were only two employees left to manage [defendant's] stores in the disputed territory – the Plaintiff and her female co-worker," and "the uncontroverted evidence demonstrate[d] that the workload increased for all remaining employees." Plaintiff's "female co-worker," the other district manager, had less experience than plaintiff. Plaintiff said she would welcome more responsibility, and defendant gave plaintiff, one of its most successful employees, some of its most difficult stores to manage. There is no evidence that plaintiff was ever demoted, had her salary cut, or suffered other objectively verifiable action. We agree with the trial court that, at best, the evidence showed that plaintiff clearly did not like or respect her supervisor, and that there were apparent conflicts in both personality and management style. We find no error.

Next, plaintiff argues that the trial court erred in allowing defendant to tax costs. Plaintiff asserts that the award of costs was contrary to the Elliott-Larsen civil rights act, which provides costs only for the complainant, MCL 37.2802, and that defendant is not entitled to costs as a prevailing party, MCR 2.625(A)(1), for reasons of public policy. We find no basis for plaintiff's position. "Absent a prohibition in a statute or court rule, or unless the court directs otherwise, costs are allowed to the 'prevailing party in an action.'" *Stamp v Hagerman*, 181 Mich App 332, 337; 448 NW2d 849 (1989), citing MCR 2.625(A)(1).

Finally, plaintiff argues that defendant should not have been allowed to tax costs for depositions. Costs for depositions are "allowed in the taxation of costs only if, at the trial or when damages were assessed, the depositions were read in evidence, except for impeachment purposes, or the documents or papers were necessarily used." MCL 600.2549. Costs cannot be awarded unless the depositions have been filed with the clerk. *Morrison v East Lansing*, 255 Mich App 505, 522; 660 NW2d 395 (2003). Plaintiff argues that the depositions were not filed by defendant with the clerk, and that defendant should not be entitled to costs when plaintiff filed

the transcripts. Plaintiff also contends that the depositions were not necessarily used by defendant, as defendant only relied on the excerpts it filed with its brief.

Questions of statutory interpretation are reviewed de novo. *Elia v Hazen*, 242 Mich App 374, 380; 619 NW2d 1 (2000).

> The primary intent of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. The first criterion in determining intent is the specific language of the statute. The Legislature is presumed to have intended the meaning it plainly expressed. Courts may not speculate regarding the probable intent of the Legislature beyond the words expressed in the statute. Where the language employed in a statute is plain, certain, and unambiguous, the statute must be applied as written without interpretation. When the plain and ordinary meaning of the language is clear, judicial construction is normally neither necessary nor permitted. Such a statute must be applied, and not interpreted, because it speaks for itself. [*Portelli v IR Construction*, 218 Mich App 591, 606-607; 554 NW2d 591 (1996), citations omitted.]

Depositions used in the context of a motion for summary disposition are "necessarily used." *Id* at 599. There is no dispute that the deposition transcripts were filed with the court clerk. Under the plain language of the statute, defendant was entitled to "reasonable and actual fees paid" for the depositions that were filed. We find no error.

Affirmed.

/s/ Michael J. Talbot
/s/ Richard Allen Griffin

Wilder, J. did not participate.